

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

4 ANTHONY BLACKSHIRE) (
5) (CIVIL DOCKET NO.
6) (2:09-CV-329-TJW
7 VS.) (MARSHALL, TEXAS
8) (
9 TYSON FOODS, INC.) (AUGUST 24, 2010
10) (8:30 A.M.

11 TRIAL
12 BEFORE THE HONORABLE JUDGE T. JOHN WARD
13 UNITED STATES DISTRICT JUDGE
14 VOLUME 2 OF 2

15 APPEARANCES:

16
17 FOR THE PLAINTIFFS: MR. MICHAEL E. PIERCE
 MR. MATTHEW PAUL SKRABANEK
18 Arnold & Itkin, LLP
 1400 McKinney, Suite 2550
19 Houston, TX 77010

20 APPEARANCES CONTINUED ON NEXT PAGE

21 COURT REPORTER: MS. SHELLY HOLMES, CSR
 Deputy Official Court Reporter
22 2593 Myrtle Road
 Diana, Texas 75640
23 (903) 663-5082

24
25 (Proceedings recorded by mechanical stenography,
transcript produced on a CAT system.)

1 MR. CHAD NEWMAN
2 Erskine & McMahon
3 521 N. Second St.
4 P.O. Box 3485
5 Longview, TX 75606

6 FOR THE DEFENDANTS: MR. ZACHARY THOMAS MAYER
7 Kane Russell Coleman & Logan
8 1601 Elm St., Suite 3700
9 Dallas, TX 75201

10 MR. STAYTON L. WORTHINGTON
11 Coghlan Crowson, et al
12 1127 Judson Road, Suite 211
13 P.O. Box 2665
14 Longview, TX 75606-2665
15
16
17
18
19
20
21
22
23
24
25

1 I N D E X

2

August 24, 2010

3

Page

4

Appearances

1

5

Plaintiff's Closing Argument

6

6

Defendant's Closing Argument

18

7

Plaintiff's Rebuttal Closing Argument

34

8

Court's Charge

38

9

Court Reporter's Certificate

56

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE LAW CLERK: All rise.

2 THE COURT: Please be seated.

3 All right. We'll take objections at this
4 time to the Court's charge from the plaintiff.

5 MR. SKRABANEK: Your Honor, we would ask
6 that the Court add an instruction on Page 4 of the
7 charge to instruct the jury that they may not presume
8 that simply because the waiver is signed, that
9 Mr. Blackshire understood it.

10 THE COURT: Okay.

11 MR. SKRABANEK: In light of your holding in
12 the summary judgment.

13 THE COURT: The Court's going to deny that
14 request.

15 Anything further from the plaintiff?

16 MR. SKRABANEK: Nothing, Your Honor.

17 THE COURT: All right. Anything from the
18 defendant?

19 MR. WORTHINGTON: Yes, Your Honor.

20 Defendants would object to Question No. 3 as
21 written and would request that it include a
22 qualification based on the response to Question No. 2,
23 as it does for Question No. 1.

24 THE COURT: Okay. That request is denied.

25 MR. WORTHINGTON: Thank you, Your Honor.

1 THE COURT: Anything further?

2 MR. WORTHINGTON: No, Your Honor.

3 THE COURT: All right. Well, I guess we'll
4 have a formal opening of Court at 8:30. We don't want
5 them to think they're not as important as they were
6 yesterday. So I'll be back, and we'll formally open.

7 THE LAW CLERK: All rise.

8 (Recess.)

9 THE LAW CLERK: All rise.

10 (Jury in.)

11 THE COURT: Please be seated.

12 Good morning ladies and gentlemen. Thank
13 you for being here timely. I've already spoken with
14 counsel.

15 At this time, does the defendant have any
16 further witnesses?

17 MR. MAYER: No, Your Honor, the defendant
18 rests at this time.

19 THE COURT: All right. Plaintiff?

20 MR. PIERCE: Your Honor, the plaintiff
21 rests, as well.

22 THE COURT: Okay. All right. Ladies and
23 gentlemen, that means we've heard all the evidence in
24 the case, and we've, of course, worked with counsel. We
25 were here early this morning and got the Court's charge

1 ready. So the first thing we need to do is have closing
2 arguments. We'll hear from the plaintiffs first.

3 MR. PIERCE: Thank you, Your Honor. May it
4 please the Court.

5 THE COURT: Mr. Pierce.

6 MR. PIERCE: Ladies and gentlemen, I want
7 to take just a moment to thank you again. I want to
8 thank you for the time and for the attention you've
9 given to this case. This isn't the biggest case that's
10 ever been tried in this courthouse. But to
11 Mr. Blackshire it is the biggest case that's ever been
12 tried in this courthouse because when today's over, I'm
13 going to go back to my law firm. I'm going to back to
14 other cases. These lawyers for Tyson are going to do
15 the same thing. Tyson is going to keep on doing what
16 they do, and you folks are going to go back to your
17 lives. But tomorrow and next week and next month, next
18 year, there's one person in this courtroom who has to
19 live with the consequences of what happens, and that's
20 Mr. Blackshire.

21 And so today is very well the most important
22 day of his life. And without folks like you who are
23 willing to come down and serve on juries like this, he's
24 denied that day. And so we all thank you for your
25 service in this case.

1 In my time with you this morning, I want to
2 do a couple of things. I want to talk to you about the
3 evidence that you've heard, and I want to go back to
4 something that the defense counsel brought up in the
5 beginning of this trial. There are two points they made
6 that I think are absolutely critical.

7 The first is don't check your common sense
8 at the door. The reason we want you -- the reason that
9 we have a jury system is so that we can have citizens
10 like you come in, look at evidence, and say, "You know
11 what, that just doesn't make sense." And there's some
12 points like that in this case, and I want to talk to you
13 about that.

14 The second thing that the defendants brought
15 up that to me is absolutely critical in the case was
16 this whole point about there being two sides to every
17 story. There normally are, but I'm going to tell you
18 this, as we go through what the defendant's witnesses
19 actually said, they have no side. They don't have
20 anything to refute the evidence you've heard. I'm going
21 to talk to you about that.

22 First, let's talk about the accident. On
23 October 26th, 2007, Mr. Blackshire was injured.
24 Nobody's really fighting that. You heard from the
25 doctor. X-rays don't lie. CT scans don't lie. MRIs

1 don't lie. There's evidence he was injured.

2 So then the next question is why? What
3 happened to injure him? Ladies and gentlemen, there's
4 only one person that you've heard from in this entire
5 trial who was there, who saw what happened, and who told
6 you what happened, and that's Mr. Blackshire himself.
7 Mr. Blackshire told you that for whatever reason, this
8 jack malfunctioned and it pinned him against the wall.

9 You heard from Mr. Madeley, a certified
10 safety professional and licensed engineer, somebody who
11 is familiar with OSHA, the federal law governing
12 workplace safety. He told you that Tyson had an
13 absolute responsibility to make sure that they provided
14 safe equipment for their workers. He told you that
15 Tyson had an absolute responsibility to take
16 malfunctioning equipment out of service. And in this
17 case, based on the evidence that we have, they didn't do
18 that. They failed in their responsibility. That was
19 unreasonable.

20 Two sides to every story. What did
21 defendants tell you? First, they don't have a single
22 witness who can come in and say what Mr. Blackshire says
23 is wrong. I saw it, and it didn't happen the way he
24 says.

25 Next, they have Ms. Williams and Ms. Gatlin.

1 Talk about credibility. Ms. Williams walked into this
2 courtroom, sat on that witness stand, and went into
3 great detail with you about every conversation she had
4 with Mr. Blackshire. Oh, no, he never reported to me
5 that there was a problem that morning. I talked to him.
6 I had to ask him to run the pallet jack because my other
7 jack operator couldn't do it. Went into great detail.
8 When I was sitting at that table listening to it, I
9 didn't know what to make of it because I had a sworn
10 deposition in my hand that did not match at all what
11 this lady was saying.

12 The most important questions you heard in
13 this trial, ladies and gentlemen, is when I got up and I
14 said, "Ms. Williams, you remember when I took your sworn
15 deposition two months ago? On that day, you didn't
16 remember any conversation. You couldn't tell us one
17 way or the other whether you'd even talked to
18 Mr. Blackshire."

19 And do y'all remember I walked up, I showed
20 her her deposition, and I said, "What does it say? Did
21 you remember the conversation?"

22 "No."

23 Common sense, ladies and gentlemen. How
24 does someone under oath two months ago not remember a
25 conversation and then walk into a courthouse after

1 meeting with Tyson's attorneys and all of a sudden that
2 conversation is crystal clear? She has no doubt about
3 it. Ms. Williams is an honest lady, and she ended up
4 admitting -- she goes, "I don't remember one way or the
5 other."

6 Ms. Gatlin. Ms. Gatlin came into this
7 courtroom and when opposing counsel was questioning her,
8 she was really clear -- again, crystal clear, picture
9 perfect. He told me the jack -- he pinned himself
10 against the wall, and I wrote down exactly what he said.

11 Well, ladies and gentlemen, that's kind of
12 funny because we have the document that's not in
13 Mr. Blackshire's handwriting. It's in her handwriting.
14 She doesn't say that he pinned himself against the wall.
15 What does she say? She says, "Driving jack, backing up
16 against pole, jack ran and pinned him up against pole."
17 Ladies and gentlemen, these jacks aren't supposed to run
18 at you. Every witness admitted that. Why is this
19 crucial?

20 Let's go back to Ms. Williams for a minute.
21 Do y'all remember when I was questioning her, and I
22 said, "Ms. Williams, is this jack supposed to run at
23 you?"

24 "No."

25 "If the jack ran at Mr. Blackshire, what

1 should he have done?"

2 "He should have reported it."

3 "And if he reported the jack ran at him,
4 what should happen?"

5 "It should be recorded."

6 It's right here. It's in plain English.
7 The jack ran.

8 So if we take away Ms. Williams not
9 remembering these conversations, if we take away this
10 excuse that Mr. Blackshire told them he pinned himself
11 which doesn't show up anywhere here, what do we have
12 left?

13 Well, now, they put up Mr. Howard, the
14 maintenance supervisor. And what does Mr. Howard tell
15 you? Mr. Howard says, "I never heard anything about
16 this. I don't know anything about it. I didn't inspect
17 the jack that day, but I would have heard if this had
18 hurt somebody."

19 Well, ladies and gentlemen, I'll submit this
20 to you, in order for Mr. Howard to know this thing
21 malfunctioned, somebody's got to tell him. I'm not
22 claiming he's psychic.

23 Mr. Blackshire went in and he reported that
24 this jack ran, and then we go back to Ms. Williams. Do
25 y'all remember me questioning her? I said,

1 "Ms. Williams, did this get reported to safety?"

2 "I don't know."

3 "Ms. Williams, did this get reported to
4 maintenance?"

5 "I don't know."

6 Last question and maybe one of the most
7 important questions in this trial: "Should it have been
8 reported?"

9 "Yes."

10 Their own witnesses admits that based on
11 this information, it should have been reported to
12 maintenance, and it wasn't. Do I blame Mr. Howard for
13 not knowing about this? No, I don't blame him because
14 nobody told him. That was Ms. Williams' job. That was
15 Ms. Gatlin's job, and they failed in their jobs.

16 What's the last thing about the accident
17 that I want to touch on -- one last thing. Tyson -- and
18 this is something that even their lawyers cannot explain
19 away. They have rules. One of the rules they have, and
20 we looked at this before, remember when Ms. -- when
21 Ms. Williams was on the stand, I asked her, "If
22 Mr. Blackshire really did what you claim, if he pinned
23 himself up against a wall, is this safe?"

24 Answer: "No, it's not safe."

25 "Do you have a policy?"

1 "Yes, we have a policy."

2 What does the policy require?

3 Ladies and gentlemen, y'all can read this
4 just as well as I can. If he is not operating this
5 safely, if he does something unsafe, whether or not
6 there's even an accident, he is subject to disciplinary
7 action. I asked Ms. Williams, he -- "You're claiming he
8 came and reported to you that he's operating this in
9 such a way that it would be unsafe. Where's the
10 disciplinary action?" It's not there.

11 Two sides to every story. They have these
12 excuses, but when you look at them and you look at the
13 evidence, they don't make sense. This was reported.
14 It's in their own documents. Maintenance didn't know
15 about this because it didn't get reported up the chain
16 by Ms. Williams, like she admits it should have.

17 And then, finally, if this happens the way
18 they claim, where's the disciplinary action? If he's
19 operating in an unsafe manner, where's the paperwork?
20 Let's see it.

21 The last point that they make on their side
22 of the story about the accident is to say, "We check
23 these jacks out all the time. We check them every week.
24 We check them every month. We check them every
25 quarter." Ladies and gentlemen, these jacks, just like

1 ever other piece of mechanical equipment, can fail. You
2 heard it in voir dire. Whenever we were picking the
3 jury, how many people did I ask, "Have you seen a pallet
4 jack fail?"

5 "Yes."

6 Now, what would be nice to have? The
7 records. I would love to be able to look at you and
8 tell you, "Folks, here's the report. This thing hadn't
9 been inspected for a month." I can't tell you that,
10 though. You know why? Because I've never seen the
11 records. I don't have those records. They don't even
12 have those records. That's a problem. How can you sit
13 here and tell us this thing is in good working order
14 when you can't prove it? And they can't prove it.

15 Ladies and gentlemen, when you look at all
16 the evidence -- when you look at both sides of this,
17 they don't have a story. They don't have any evidence,
18 and their witnesses don't hold up. The only account you
19 have in front of you is what Mr. Blackshire says, and
20 nobody can prove it's wrong. When you go back in the
21 jury room and you talk about this, think about
22 something. If their story is true, if he messed up that
23 day, why wasn't he written up? If he really went to his
24 supervisor and said, "I did this in an unsafe way," why
25 did she violate their policy and not write him up? It

1 doesn't make sense. Don't check your common sense at
2 the door.

3 Let's talk about this waiver. That's going
4 to be the next thing you're asked about. Did
5 Mr. Blackshire waive his rights? You heard Ms. Gatlin
6 on the witness stand, and they did this big dog and pony
7 show with her about how great this program is that Tyson
8 has. Make no mistake about it, ladies and gentlemen,
9 this program is designed to do one thing. They want you
10 to commit up front and give up every right you have on
11 the chance that they'll continue to be good to you, that
12 they'll continue to pay you. That's what the program
13 is.

14 On the day that this occurred, they brought
15 Mr. Blackshire in. They talked to him. Same thing for
16 Ms. Gatlin as we had with Ms. Williams. On direct
17 examination with Tyson's lawyers, crystal clear memory,
18 picture perfect, remembered every detail. But my law
19 partner, Mr. Skrabanek got up. Y'all remember this?
20 And walked up to her and said, "Now, when we took your
21 deposition, you told us you didn't remember if it was
22 you having the conversation or if it was one of your
23 nurses."

24 It's kind of funny how a couple of months
25 ago under oath she didn't know, but then in the

1 courthouse after meeting with Tyson's lawyers, she was
2 sure of it. She was sure she had that conversation.
3 She was sure he understood. She doesn't know. She
4 doesn't remember. She told the truth in her deposition.

5 The next point they make about this waiver,
6 and I think the biggest point in the case regarding this
7 waiver, whether he understood it.

8 THE COURT: You've used 13 minutes.

9 MR. PIERCE: Thank you, Judge.

10 They will tell you on the one hand --
11 remember this accident report that we keep going back
12 to? Ms. Gatlin will tell you on the one hand,
13 Mr. Blackshire didn't understand this well enough to be
14 able to write it himself. That's why she had to write
15 it. But then on the other hand, she will tell you that
16 we have this nice document full of legal language
17 drafted by Tyson's lawyers, and Mr. Blackshire, boy, he
18 absolutely got that.

19 Did she tell him what he was giving up? No.
20 Did she tell him you may want to talk to a lawyer? No.
21 Did she do anything to make sure he understood? No.
22 Was it voluntary? No. You heard from her, if
23 Mr. Blackshire stood up and said "I don't want to sign
24 this document," guess what happens? Leave of absence.
25 They send you home. And guess what? That great benefit

1 plan they have with all those doctors, that's out the
2 window, too. It's not voluntary, and he didn't
3 understand it.

4 And they can't prove to you he did. That's
5 their burden. We've been talking about burden of proof
6 the whole trial. They have the burden on that issue.
7 They've got to tilt the scales to prove to you that he
8 knew about it, that he understood it, and that it was
9 voluntary. They can't do it.

10 The last thing I want to talk to you about
11 this morning are the consequences. Because of what
12 Tyson did, we went through this with the doctor.
13 Mr. Blackshire has almost \$6,000.00 in past meds that
14 haven't been paid. You heard the doctor say he's going
15 to need another 50 in future medications. This is money
16 not to make Mr. Blackshire rich, this is money to pay
17 the doctors to treat the injuries he has that they
18 caused. That's fair.

19 Ladies and gentlemen, they may get up and
20 nitpick with these numbers and fight about it, but the
21 truth of the matter is, did they bring you a doctor to
22 say it's wrong? They didn't. The only competent
23 medical evidence you have heard in this case is that
24 these injuries were caused at Tyson, that they're
25 ongoing, and that he's going to need medical treatment.

1 So we ask you to award that.

2 The last thing I'll say is this. Ladies and
3 gentlemen, we're not here asking for millions of
4 dollars. We're not. We're asking for this man's
5 medical to be paid, and here's why. If somehow you
6 decide, you know what, we're going to give him half
7 that, in three years if he runs out of money and can't
8 afford this, he doesn't get to come back. He doesn't
9 get to talk to another jury and tell them, "You know
10 what, Tyson's lawyers were too good. They tricked the
11 first jury, and they didn't give me enough money to pay
12 for my meds." He doesn't get to do that.

13 The last thing I'm going to ask you for is
14 this. He's been through pain and suffering. And we'd
15 ask you to award whatever you think is fair for that,
16 because this is something, again, that he's got to live
17 with. Not you, not me, definitely not Tyson. Anthony's
18 got to live with it. And after today, the only thing
19 he's going to have is whatever you think is fair and
20 whatever you give to him, and that's what we ask you to
21 do.

22 Thank you, Judge.

23 THE COURT: Thank you.

24 Mr. Mayer?

25 MR. MAYER: Yes, Your Honor. May it please

1 the Court.

2 THE COURT: Mr. Mayor.

3 MR. MAYER: Counsel.

4 Ladies and gentlemen of the jury, you'll
5 remember back yesterday morning at the beginning of this
6 case, we explained that this trial will be about a -- a
7 few simple principles. First, taking responsibility for
8 your own actions. Next, it's living up to a promise.
9 But what we learned in this trial is that there's
10 another issue that was developed, and that is someone
11 changing their story when they have something to gain.

12 Throughout this entire trial, you heard the
13 plaintiff's attorney say that it was only Mr. Blackshire
14 who knows what happened that day because he was the only
15 one there. Well, that's true. There was no one else
16 working right next to him at the time this incident
17 occurred. So he, in fact, was the only one there.

18 But what you have to look at is how
19 drastically his version of this incident changed from
20 October 26th until today when he's presenting his case
21 and asking for money damages from you. Then you ask --
22 have to ask yourself why did it change? Because he's
23 got something to gain. But don't just take my argument
24 for it. What I want you to do is I want you to judge
25 the credibility of the testimony. The credibility of

1 the evidence and the documents that prove that the
2 plaintiff's attorney is right, there are definitely two
3 sides to Mr. Blackshire -- Blackshire's story.

4 The first side of the story is what he told
5 Tyson back on October 26th.

6 The second side of that story is what he is
7 coming in this courtroom today and telling you. His
8 version of the story during this trial has been this,
9 that he was operating a pallet jack that he -- he
10 inspected that morning and had no problem operating it
11 from Point A to Point B. He was then waiting for
12 another gentleman to come out of a cooler. So what did
13 he do? He said he stepped away four to five feet from
14 that pallet jack. And when he did, that handle was in
15 the upright position. It was in a braking position.
16 And he said that when he turned around again to look
17 back to his right, all of a sudden, suddenly he saw the
18 handle in a down position and the pallet jack was
19 accelerating towards him, a runaway pallet jack. That
20 is the one side of the story that he's telling you
21 today.

22 But let's look at the evidence that proves
23 what the other side of the story is. See, we heard from
24 witnesses during this trial. We also reviewed
25 documents. And what I'd like to do in my moments with

1 you is go through what that evidence showed and what
2 those documents prove.

3 The first person that you heard from from
4 Tyson was Patricia Williams. Ms. Williams is a front
5 line supervisor. That's what she does for a living.
6 She certainly does not come in courtrooms and testify in
7 front of juries and get paid for it. Her job is back at
8 the plant, and the plaintiff's lawyer is right, she's
9 back living her life at the plant. She's doing her job
10 day in and day out.

11 So when they fuss with her about how she
12 testified, I hope you'll realize that Ms. Williams is a
13 plant supervisor. She's not a paid expert like
14 Mr. Madeley or even Dr. Lee who has done this time and
15 time before. Each one of the Tyson folks, their primary
16 job is being a nurse, being a maintenance man, or being
17 a front line supervisor, not being a professional
18 witness.

19 But what did Ms. Williams tell you? Her
20 version of that morning was very clear. She asked
21 Mr. Blackshire to run the jack, and a few hours later
22 Mr. Blackshire came to her and said, "I was operating
23 the jack, and I pinned myself against the wall."
24 There's nothing else to remember. It's not rocket
25 science. It's one sentence, and she remembered that one

1 sentence clearly.

2 Ladies and gentlemen, if -- if there would
3 have been any reference at all to Ms. Williams about a
4 malfunctioning jack, she would have done exactly what
5 she should have, and that is walk down to her
6 Maintenance Department which was a few hundred yards
7 away and said, "Men, I would really like you to take a
8 look at this jack."

9 If Mr. Blackshire actually reported this
10 runaway jack, she would have called up Mr. Howard and
11 said, "We've got a problem here." And certainly if
12 anyone would have reported a malfunctioning jack before
13 that day, Ms. Williams would have taken care of it. She
14 testified to you that if that would have ever been
15 reported, it was her job, her responsibility, and more
16 than anything, just what she would have done because it
17 was right. She would have taken care of it. But no
18 one, not Mr. Blackshire, not any other employee reported
19 an accelerating runaway jack before this trial.

20 So the next person that you heard from was
21 Ms. Jessica Gatlin. Ms. Jessica Gatlin talked very
22 fast. We can all tell that she's not a professional
23 witness, but her story and her testimony was credible.
24 She was consistent in that she said Mr. Blackshire came
25 on October 26th, the day of the incident, and said, "I

1 want to report what just happened. I'm reporting that I
2 was operating a pallet jack, and I pinned myself against
3 the wall."

4 As the nurse wanting to help, she said, "Are
5 you okay?"

6 He said, "Yeah, I'm fine. I'm going to go
7 back, I'm going to finish my shift."

8 That was on the day of the incident. No
9 reference to standing four or five feet away from the
10 pallet jack and it accelerating into him. That type of
11 information, that would have required an investigation.
12 That would have required some kind of disciplinary
13 looking into. But a simple statement, a one-sentence
14 statement that "I was operating the jack, and I pinned
15 myself against the wall," that doesn't require an
16 investigation.

17 But I don't want you only to take Tyson's
18 testimony for it. What I want you to do next is I want
19 you to look at the evidence. I want you to look at the
20 documents in this case. The first document that we have
21 happened on November 1st. Incident is on October 26th.
22 Mr. Blackshire comes in on November 1st, and he meets
23 with Ms. Gatlin. He comes back and he says, "Over the
24 weekend, I went to the emergency room and my back's
25 hurting me."

1 And she said, "Well, I want you to indicate
2 on this form exactly where -- where you're hurting."

3 And he did. He put the dots in there. He
4 also signed the document.

5 And then she said, "I want you to describe
6 for me, and we're going to fill out this report
7 together."

8 The plaintiff's attorney is -- is critical
9 of Ms. Gatlin for helping Mr. Blackshire fill out the
10 report. But, again, let's use our common sense here.
11 The report states very clearly that what was he doing,
12 number one, driving the jack, not standing four or five
13 feet away from it. And then secondly, it says, "Driving
14 the jack, backing up against pole, jack ran and pinned
15 him up against the pole."

16 I want you to recall back to the cross
17 examination. Plaintiff's lawyer actually crossed
18 Ms. Gatlin on the fact that she did not put "self." She
19 didn't put "himself," she just put "him."

20 Now, I also want you to use your common
21 sense when you're evaluating this language.
22 Mr. Blackshire was in her office. Her office is small.
23 They're sitting next to each other. They're filling out
24 this -- this document. If the discrepancy between the
25 incident was so great that Ms. Gatlin put driving the

1 pallet jack backing up, whereas Mr. Blackshire said,
2 "No, I was four or five feet away, and it accelerated
3 into me after the handle dropped," Mr. Blackshire never
4 would have signed that document.

5 He would have said -- just like when he was
6 indicating where he was hurt, "We need to change that
7 document. We need to clearly indicate what happened
8 that day." But he didn't do it. The reason why is
9 because the incident, as described by Mr. Blackshire,
10 was consistent. It was consistent with Patricia
11 Williams. It was consistent with Jessica Gatlin. And
12 it was consistent on the document that he signed on
13 November 1st.

14 So don't stop there. Those are three -- two
15 Tyson employees and a Tyson document. I want you to
16 look further at the evidence. And I want you to
17 consider the first doctor that Mr. Blackshire saw was
18 Dr. Nielsen. He chose Dr. Nielsen, and he went to him.
19 And you'll remember that Mr. Blackshire testified that
20 Dr. Nielsen, he referred me to another doctor and they
21 helped me out. What's important -- it's in the record
22 that you'll have the opportunity to review -- from
23 Dr. Nielsen. This is a medical record that comes from
24 his office. There's a questionnaire that's filled out
25 that first -- that first day that he treats with him

1 which is November 6th, 2007. It's a patient information
2 sheet. And I know it's somewhat difficult to read in
3 the middle, but I want you to follow along with me if
4 you can. Where it says patient's information, the
5 patient name is Anthony Blackshire. And it says, "Give
6 statement of cause of injury." On October -- November
7 6th, it states, "Drove jack into himself and pinned
8 himself between jack and wall." Exactly the same
9 version that Mr. Blackshire told Tyson. This isn't
10 coming from Tyson. This is coming from Dr. Nielsen.
11 And who signed this document? No one other than Anthony
12 Blackshire.

13 So we've got two people who testified.
14 We've got an injury report. Now, we have a medical
15 record from Dr. Nielsen that is, again, signed by
16 Mr. Blackshire that proves he pinned himself against the
17 wall.

18 The last person I want you to consider, and
19 that is Dr. Lee. Dr. Lee came before you, and he
20 described the medical treatment that he is currently
21 giving Mr. Blackshire. But what he also described was
22 very important. He said that I relied upon what the
23 patients tell me so I can evaluate the patients and
24 treat them properly. And what he said specifically is
25 that Mr. Blackshire told him he was operating the pallet

1 jack when it lost control. Nothing -- nothing about
2 standing four or five feet away from it, not operating
3 it and a runaway pallet jack.

4 Dr. Lee is Mr. Blackshire's own document --
5 doctor. And what I want you to consider is how that
6 story from the beginning up until the time that he
7 testified in front of you -- in front of you has
8 remained consistent. That's the one side of the story
9 that is proven by the testimony and the documents and
10 the evidence.

11 The other side of the story is what he told
12 you when he testified. And I want you to really judge
13 the credibility of that version because no one, not
14 Tyson, not the doctors, not the documents reflect that
15 version of the story.

16 So what the -- the Judge is going to do here
17 momentarily is he's going to read what is called jury
18 instructions, a jury charge. That's your road map when
19 you go back to deliberate, and I want to cover just a
20 few things about that jury charge.

21 It's a long document, and it's got a lot of
22 instructions that come directly from the Court. But one
23 of those instructions that I believe is really important
24 coming from the Judge states: "You must determine
25 whether the plaintiff has established by a preponderance

1 of the evidence -- that goes back to that -- that burden
2 of proof that we talked about in the beginning. The
3 Judge is going to remind you about that burden of proof,
4 that the plaintiff has the burden by a preponderance of
5 the evidence to prove their case. And what must they
6 prove?

7 First of all, they must show that the
8 negligence of Tyson proximately caused Mr. Blackshire's
9 injuries. And the Court's going to instruct you that a
10 corporation such as Tyson can only through its officers,
11 employees, or agents act. Tyson is only made up of
12 people like Patricia Williams, Jessica Gatlin, and Larry
13 Howard. So what you need to decide, as the Court
14 instructs, the burden is on the plaintiff to establish
15 by a preponderance of the evidence in this case that the
16 negligence of one or more officers, employees, or agents
17 of Tyson was a proximate cause of the injuries.

18 Basically, what the Court is instructing you
19 is that you must find that one of the employees at Tyson
20 was negligent. You might ask yourself, what is
21 negligence? Well, there's an instruction for that, too.
22 And negligent means the failure to use ordinary care,
23 ordinary care. Not extraordinary care. Not perfect
24 care. Ordinary reasonable care. Using this standard,
25 you have to judge the testimony.

1 And I want you to think about Larry Howard,
2 the maintenance manager. He had a long history of
3 maintenance, and we went through that on test -- on the
4 witness stand. But what was important is he never
5 wavered from his testimony in that his maintenance
6 program is solid. And what it is, is it's a weekly, a
7 monthly, and a quarterly maintenance program for these
8 pallet jacks. He's got seven people from the
9 Refrigerated Department, that's all they do. They work
10 on pallet jacks. And he described to you in his
11 testimony that they make sure that those pallet jacks
12 are operating safely, that they're not malfunctioning,
13 and that if anything is reported to him, he takes care
14 of it immediately. That maintenance program was
15 reasonable, but you don't have to just take Mr. Howard's
16 version of how the maintenance program was actually in
17 place.

18 Let's think about Mr. Madeley. This is the
19 hired expert that the plaintiff's brought before you. I
20 asked Mr. Madeley, I said, "Assume with me that the
21 maintenance program consisted of a weekly, a monthly,
22 and a quarterly servicing, as well as a requirement that
23 any operator inspect the pallet jack before they used
24 it. Would that be reasonable?"

25 And he said, "Yes, that would be reasonable.

1 That's what I would expect from Tyson."

2 And that is exactly what Tyson did.

3 Now, the plaintiffs have made a big fuss
4 about these -- these documents, and -- and I'll be
5 honest, no one -- no one in this courtroom wants those
6 documents more than I do because I know what they're
7 going to prove. They're going to prove exactly what
8 Mr. Howard testified to, that that pallet jack was
9 inspected seven days before at least, that that pallet
10 jack was inspected at least 30 days before, and it was
11 inspected quarterly.

12 But because this lawsuit was brought some
13 almost two years after the incident, Tyson had changed
14 its policy. It went from paper to paperless. And in
15 this great movement of going to paperless, they
16 discarded the documents. But that does not discount
17 Mr. Howard's testimony that he has a program in place
18 that was the same in '06 as it is today, weekly,
19 monthly, and quarterly inspections.

20 THE COURT: Five minutes.

21 MR. MAYER: Thank you.

22 Now, what Mr. Madeley also confirmed is that
23 Tyson's training program was reasonable. We talked
24 about the certification, and it was remarkable that in
25 voir dire one person was certified but several people

1 had operated pallet jacks in the past. It's clear from
2 Mr. Madeley's own testimony that Tyson was reasonable in
3 the way they trained Mr. Blackshire. So given that,
4 given the testimony, the consistency in the version of
5 the incident from Mr. Blackshire on the day of the
6 incident, from Tyson's employees, from the documents,
7 you then have to answer a few questions.

8 The first question that you have to answer,
9 which I believe is the most important question in this
10 case, is did the negligence, if any, of Tyson
11 proximately cause the occurrence in question? This goes
12 back to the instruction.

13 The negligence question is did Tyson use
14 ordinary care. And Tyson means its employees, Patricia
15 Williams, Ms. Gatlin, Mr. Howard. Did they use ordinary
16 care? The clear answer to that, what the evidence
17 directs you to is yes -- I'm sorry, is no, they -- they
18 were not negligent, and, yes, they used ordinary care.
19 So was Tyson negligent? No.

20 Next question -- and there's a separate
21 element here, and that's proximate cause, and you're
22 going to get a definition of that. And there was only
23 one sole cause of this incident. The sole cause of this
24 incident was Mr. Blackshire. He pinned himself against
25 the wall. We're not faulting him for that. That's just

1 what caused the incident.

2 Now, when you answer this first question, I
3 want you to consider the credible evidence. I want you
4 to use your common sense, and I want you to think about
5 the testimony. And when you do, the answer, did the
6 negligence, if any, of Tyson proximately cause the
7 occurrence in question, it's no.

8 The next question: Did Anthony Blackshire
9 voluntarily enter -- you can't see that question.

10 Did Anthony Blackshire voluntarily enter
11 into the acceptance and waiver form with knowledge of
12 the waiver form's effect? The only person that you need
13 to think back to is Ms. Gatlin and her testimony. She
14 clearly went through with you how she explained that
15 waiver. She doesn't just hand it to him and walk away.
16 She explains it and makes sure that he understood, and
17 if he didn't understand it, he had the opportunity to
18 ask questions. And he did. He went up to HR, asked
19 questions, and came back down to Ms. Gatlin.

20 When he came back down the second time, he
21 voluntarily signed the waiver. It is clear that the
22 answer, according to the evidence, according to
23 Ms. Gatlin's testimony, is that Mr. Blackshire did
24 voluntarily enter into the acceptance waiver, and he had
25 knowledge of the waiver's effects.

1 The last issue is damages. And what the
2 Court will instruct you is that if you answer no to
3 No. 1, you don't answer No. 3, which is the damages
4 question.

5 I want you to remember a couple of things,
6 and that is about the future medical expenses. I want
7 you to put the -- the evidence before you to the test of
8 probability. The doctor said if the PT works, nothing
9 else will need to be done. If the steroid injections
10 work, nothing will need to be done. So just test the
11 credibility of that witness and that -- that testimony.

12 Pain and suffering. The only thing that I
13 know about the pain and suffering is -- is what
14 Ms. Williams saw. She said -- not having anything to
15 gain on that testimony on that witness stand, that she
16 saw Mr. Blackshire dancing.

17 Now, I understand he wasn't dancing in this
18 courtroom, but that's what she saw. I want you to
19 consider that when you're judging the credibility of --
20 of the witnesses and the testimony.

21 Ladies and gentlemen, on behalf of Tyson, on
22 behalf of Vicki Amy, on behalf of the Carthage plant, I
23 want to thank you for your time, your service as a juror
24 on this case. It is an important case, and don't let
25 the plaintiffs tell you that it's not an important case

1 to Tyson because it is. They take great pride in that
2 plant and their program, and that's why they are here in
3 this courtroom defending themselves.

4 In all, you have been very attentive and we
5 thank you for that. And Tyson looks forward to your
6 verdict in this case.

7 THE COURT: Thank you, Mr. Mayer.

8 Mr. Pierce?

9 MR. PIERCE: Your Honor, how much time do I
10 have left?

11 THE COURT: Five minutes. You wanted a
12 two-minute warning, right?

13 MR. PIERCE: Yes, sir.

14 THE COURT: Okay.

15 MR. PIERCE: I'm going to take a deep breath
16 so I can talk fast.

17 Mr. Mayer made a lot of points. I want to
18 talk to you about them. As you can imagine, we don't
19 agree on a single one of them.

20 Ms. Williams and Ms. Gatlin, he says,
21 "They're not professional witnesses, don't hold that
22 against them." I don't. I think they're nice ladies.
23 I have no problem with them. You know what I hold
24 against them? Their stories changed. Two months ago
25 under oath, they don't remember what happened. They

1 don't remember conversations. They don't remember who
2 explained something to Mr. Blackshire. And then
3 miraculously when we're in this courtroom, they
4 remember. Their memories get better with time. I don't
5 know anybody that that happens to, but it happens to
6 these ladies. That's why their testimony is not
7 credible.

8 Mr. Blackshire's story changed. That's what
9 they tell you. I'm sure you folks are as tired of
10 looking at this document as I am. But if you look at
11 it, from day one, he tells you the jack ran. If what
12 Ms. Williams told you is true and what Ms. Gatlin told
13 you is true, these words don't belong in there. It's as
14 simple as saying, "He ran it into himself." It's that
15 simple. But those words are there, and no matter how
16 hard Tyson's lawyers try to distract you from these
17 words, they're still there. You still see them. Don't
18 take my word for it. Look at the document.

19 Tyson's lawyer says Mr. Blackshire is the
20 sole cause of the accident. That's funny, because if he
21 messed up and he was unsafe, Tyson's own policies, the
22 policies they're so proud of, the policies that they're
23 here in Court to defend, those policies required
24 disciplinary action to be taken. There was none.

25 The most amazing thing to me about opposing

1 counsel's closing argument is he says if this came in
2 and Ms. Williams heard this, end of story. It's -- it's
3 real simple. It's a one-sentence thing. Well, if
4 that's the case, why when I had her on the witness stand
5 did I ask her, "Ms. Williams, was this reported to
6 safety or maintenance?"

7 "No."

8 Key question: "Should it have been?"

9 "Yes."

10 If it's as simple as these lawyers want to
11 make it out to be, why does their own witness say, "This
12 should have been reported"? Why? It doesn't quite make
13 sense.

14 Opposing counsel goes through the medical
15 records. They know that the accident report doesn't
16 support their version of the case because it says the
17 jack ran. So they literally will look for anything that
18 they can wave in front of you and say, "Oh, yeah, he
19 pinned himself."

20 They tried to do it with Dr. Lee on the
21 witness stand. Do y'all remember that? And then I came
22 back and I said, "Dr. Lee, what did you write down?"

23 He said, "I -- I wrote down it lost control.
24 I didn't write anything about it pinning himself."

25 They go to Dr. Nielsen, a doctor who is a

1 medical doctor, not a pallet jack operator, who is
2 trying to listen to Mr. Blackshire, and he writes down
3 as best he can understand what happened.

4 THE COURT: Two minutes.

5 MR. PIERCE: Is Dr. Nielsen the one who's
6 charged with investigating this accident? No.

7 The story that you have heard is consistent.
8 Mr. Blackshire told you the jack ran. Tyson's own
9 document tells you the jack ran. And no matter how hard
10 opposing counsel tries, they shouldn't be able to
11 distract you from that. Look at their own documents.

12 Mr. Mayer went through this verdict form
13 with you. I'm going to do the same thing. Was Tyson
14 negligent in this case? Absolutely they were. The
15 answer to that question is yes. Why? He says, "You
16 don't need to use super ordinary care or extraordinary
17 care, just ordinary care."

18 Ladies and gentlemen, we've all had jobs
19 before. If my employer put me in a position with a
20 malfunctioning piece of equipment, I sure wouldn't think
21 their care was ordinary. That's what happened in this
22 case. That's the only evidence you have.

23 On the issue of waiver, did Mr. Blackshire
24 voluntarily enter into the waiver? Ladies and
25 gentlemen, again, what's the evidence? They can't tell

1 you what he was thinking. He told you he didn't
2 understand it. He told you that as clear as day. And
3 Ms. Gatlin, boy, she did her best. She came in here and
4 totally changed her story, went from not remembering who
5 talked to him a couple of months ago under oath to now
6 saying, "Oh, yeah, it was me, he understood, I know
7 exactly what was going on." Credibility. Common sense.
8 That doesn't make sense. The answer to this question
9 is, no.

10 The last question is about damages. On
11 these medical expenses, we asked Dr. Lee point blank, is
12 this a possibility or a probability? He said, "It is a
13 probability." If Mr. Mayer's right and Dr. Lee is so
14 wrong, where's their doctor? Where's their witness to
15 come in and say, "You know what, Dr. Lee, boy, he's just
16 crazy. This is out of this world. There's no way
17 that's real. "

18 THE COURT: Mr. Pierce, you've got to wind
19 it up, sir.

20 MR. PIERCE: Okay.

21 Ladies and gentlemen, once again, I want to
22 thank you for your time. I appreciate your attention in
23 this case, and we look forward to your verdict, as well.

24 THE COURT: Thank you, sir.

25 Ladies and gentlemen, you've now heard all

1 of the evidence that's been presented in the case.
2 You've heard the argument of the respective attorneys in
3 support of their positions. It is my duty to give you
4 the charge in this case. It will be an oral charge as
5 given to you in an effort to assist you in your
6 deliberations in deciding the issues which you must
7 decide in order to reach a fair and impartial verdict in
8 this case. Perhaps this function of the Court is the
9 most important one that the Court performs in the trial
10 of any case, so I ask that you pay close attention to my
11 remarks.

12 Yesterday morning, you remember that at the
13 beginning, I gave you some general instructions and
14 definitions. Rather than repeat them, I will ask you to
15 recall them now in deciding the facts and issues which
16 you are to decide.

17 You are to perform your duty without bias or
18 prejudice to any party. The law does not permit jurors
19 to be governed by sympathy or prejudice. The Court and
20 the parties expect that you will carefully and
21 impartially consider all of the evidence, follow the law
22 as I will give it to you, and reach a just verdict.

23 You're instructed that all persons,
24 including the plaintiff and the defendant in this case,
25 stand equal before the law and are to be dealt with as

1 equals in this Court. The law is no respecter of
2 persons.

3 First thing I'll do is briefly review the
4 contentions of the parties and then give you some
5 additional instructions and definitions that will guide
6 you in deciding the issues or facts that you must decide
7 and resolve in this case.

8 Now, the plaintiff, Anthony Blackshire,
9 seeks damages for personal injuries he sustained while
10 he was an employee of the defendant, Tyson Foods,
11 Incorporated, because of a pallet jack that
12 malfunctioned and injured the plaintiff. The plaintiff
13 contends that the defendant was negligent because the
14 defendant was on notice of previous malfunctions of the
15 particular pallet jack, but failed to take the necessary
16 steps to fix it.

17 Now, you must determine whether the
18 plaintiff has established by a preponderance of the
19 evidence that the negligence of Tyson Foods,
20 Incorporated, proximately caused his injuries.

21 Now, a corporation can only act through its
22 officers, employee, or other agents. The burden is on
23 the plaintiff to establish by a preponderance of the
24 evidence in the case that the negligence of one or more
25 officers, employees, or agents of the corporation was a

1 proximate cause of any injuries and consequent damages
2 sustained by the plaintiff.

3 The defendant denies that it was negligent,
4 and the defendant contends that it did not cause the
5 plaintiff injury because the plaintiff's conduct was the
6 sole cause of his injuries. The defendant further
7 contends that the plaintiff waived his rights to bring
8 the present lawsuit by signing the acceptance and waiver
9 form of defendant's Workplace Injury Settlement Program
10 and accepting the benefits pursuant to the program.

11 Now, for some more definitions and
12 instructions. I'm going to give you the definitions
13 that -- and instructions that will guide you.

14 Negligence means the failure to use ordinary
15 care, that is, failing to do that which a person of
16 ordinary prudence would have done under the same or
17 similar circumstances or doing that which a person of
18 ordinary prudence would not have done under the same or
19 similar circumstances.

20 Ordinary care means that degree of care that
21 would be used by a person of ordinary prudence under the
22 same or similar circumstances.

23 Proximate cause means that cause which in a
24 natural and continuous sequence produces an event and
25 without which cause such event would not have occurred.

1 Now, in order to be a proximate cause, the
2 act or omission complained of must be such that a
3 person using ordinary care would have foreseen that the
4 event or some similar event might reasonably result
5 therefrom.

6 Now, there may be more than one proximate
7 cause of an event, but if an act or omission of a
8 plaintiff was the sole proximate cause of the
9 occurrence, then no act or omission of any other person
10 could have been a proximate cause.

11 Now, with respect to the waiver by the
12 plaintiff, Mr. Blackshire, the defendant contends that
13 the plaintiff waived his rights to bring the present
14 lawsuit by signing the acceptance and waiver form of
15 defendant's Workplace Injury Settlement Program and
16 accepting benefits pursuant to the program. The
17 plaintiff denies that he had actual knowledge of the
18 provisions of the agreement related to the waiver and
19 thus did not voluntarily sign the waiver with knowledge
20 of the waiver's effect.

21 Now, the burden is on the defendant to
22 establish by a preponderance of the evidence in the case
23 that the plaintiff waived his common law right to bring
24 the present lawsuit.

25 Now, waiver is an intentional surrender of a

1 known right. To establish that the plaintiff waived his
2 right to bring this lawsuit, the defendant must show
3 that, one, the plaintiff voluntarily entered into a
4 waiver with knowledge of the waiver's effect.

5 Two, the waiver was entered into not earlier
6 than the 10th business day after the date of the initial
7 report of injury.

8 And, three, the plaintiff before signing the
9 waiver received a medical evaluation from an
10 emergency -- I mean, from a nonemergency care doctor.

11 Four, the waiver is in writing under the --
12 under which the true intent of the party is specifically
13 stated in the document.

14 And, five, the waiver provisions must be
15 conspicuous and appear on the face of the agreement.

16 Now, in order for a waiver provision to be
17 conspicuous, the waiver provision must appear in a type
18 larger than the type contained in the body of the
19 agreement or in contrasting colors. In this case, the
20 only elements of -- in dispute are whether a waiver was
21 voluntarily entered into by the plaintiff and whether
22 the waiver was entered into with knowledge of the
23 waiver's effect.

24 I'm going to talk to you about damages. I'm
25 going to instruct you as to the calculation of damages,

1 should you find that the plaintiff has met his burden on
2 his negligence claim. If the plaintiff has proven his
3 claim against the defendant by a preponderance of the
4 evidence, you must determine the damages to which the
5 plaintiff is entitled.

6 Now, you should not interpret the fact that
7 I have given instruction about plaintiff's damages, if
8 any, as an indication in any way that I believe that the
9 plaintiff should or should not win this case. It is
10 your task, first, to decide whether the defendant is
11 liable. Instructions as to the measure of damages are
12 given for your guidance in the event you should find in
13 favor of the plaintiff from a preponderance of the
14 evidence in the case in accordance with my other
15 instructions.

16 If you find that the defendant is liable,
17 you must award the amount you find by a preponderance of
18 the evidence as full and just compensation for all the
19 plaintiff's damages. Compensatory damages are not
20 allowed as a punishment against a party. Such damages
21 cannot be based on speculation, for it is only actual
22 damages, what the law calls compensatory damages, that
23 are recoverable. However, compensatory damages are not
24 restricted to actual loss of time or money. They
25 include both the mental and physical aspects of injury,

1 tangible and intangible. They are an attempt to make
2 the plaintiff whole or to restore him to the position he
3 would have been in if the defendant had not acted
4 wrongfully. You must not award compensatory damages
5 more than once for the same injury. The plaintiff is
6 only entitled to be made whole once and may not recover
7 more than he has lost.

8 You're instructed that all damages must be
9 reasonable. If you find that the plaintiff is entitled
10 to a verdict, you may award only such sums of money, if
11 now paid in cash, that you find would fairly and
12 reasonably compensate him for such damages you find from
13 a preponderance of the evidence in the case that he has
14 sustained as a direct result of the incident in
15 question.

16 If you find that the defendant is liable,
17 you may award the plaintiff money damages. Should you
18 award money damages, you will consider the following
19 elements of actual damages, if any, and none other.

20 First, damages accrued. If you find for the
21 plaintiff, he is entitled to recover an amount that will
22 fairly compensate him for any damages that he has
23 suffered to date.

24 Then with respect to future damages. If you
25 find that the plaintiff is reasonably certain to suffer

1 damages in the future because of his injuries, then you
2 should award him the amount you believe would fairly
3 compensate him for such future damages. An award of
4 future damages necessarily requires that payment be made
5 now for a loss that the plaintiff will not actually
6 suffer until some future date. If you should find that
7 the plaintiff is entitled to future damages, then you
8 must determine the present worth in dollars of such
9 future damages.

10 If you make an award for future medical
11 expense, you must reduce it to present value by
12 considering the interest that the plaintiff could earn
13 on the amount of the award if he made a relatively risk
14 free investment. The reason why you make this reduction
15 is because an award of an amount representing future
16 medical expenses is more valuable to the plaintiff if he
17 receives it today than if he would otherwise have
18 received it in the future. It is more valuable because
19 the plaintiff can earn interest on it for the period of
20 time between the date of the award and the date he would
21 have incurred the medical expenses. Thus, you should
22 adjust the amount of any award for future medical
23 expenses by the amount of interest that the plaintiff
24 can earn on that amount in the future.

25 However, you must not make any adjustment to

1 present value for any damages you may award for future
2 pain and suffering or future mental anguish.

3 Now, with respect to personal injury and
4 mental anguish, you may award damages for personal
5 injury that the plaintiff sustained and any pain and
6 suffering and mental anguish that he experienced in the
7 past or will experience in the future as a result of the
8 injury. No evidence of the value of -- of intangible
9 things such as mental anguish or physical pain or
10 suffering has been or need to be introduced. You are
11 not trying to determine value, but an amount that will
12 fairly compensate the plaintiff for damages, if any, he
13 has suffered. There is no exact standard for fixing the
14 compensation to be awarded for these elements of
15 damages. Any award that you make should be fair in
16 light of the evidence.

17 Now, with respect to medical expenses, you
18 may award the reasonable expenses of hospitalization and
19 medical and nursing care and treatment that Anthony
20 Blackshire has incurred in the past and will incur in
21 the future which were proximately caused by the
22 defendant's conduct.

23 Now, with respect to mitigation of damages,
24 a person who claims damages resulting from the wrongful
25 act of another has a duty under the law to use

1 reasonable diligence to mitigate, that is, to avoid or
2 minimize those damages. If you find the defendant is
3 liable and the plaintiff has suffered damages, the
4 plaintiff may not recover for any item of damages which
5 he could have avoided through reasonable effort. If you
6 find by a preponderance of the evidence that the
7 plaintiff unreasonably failed to take advantage of an
8 opportunity to lessen his damages, you should deny him
9 recovery for those damages which he would have avoided
10 had he taken advantage of the opportunity.

11 You are the sole judge whether the plaintiff
12 acted reasonably in avoiding or minimizing his damages.
13 An injured plaintiff may not sit idly by when presented
14 with an opportunity to reduce his damages. However, he
15 is not required to exercise unreasonable efforts or
16 incur unreasonable expenses in mitigating the damages.

17 Now, the defendant has the burden of proving
18 the damages which the plaintiff could have mitigated.
19 In deciding whether to reduce the plaintiff's damages
20 because of his failure to mitigate, you must weigh all
21 the evidence in light of the particular circumstances of
22 the case using sound discretion in deciding whether the
23 defendant has satisfied its burden of proving the
24 plaintiff's conduct was not reasonable.

25 Now, these instructions are given to you as

1 a whole. You are not to single out one instruction
2 alone as stating the law, but you must consider
3 instructions as a whole. You have heard all the
4 evidence in the case. You've heard argument of counsel.

5 Now, the Court has now given you the charge
6 on the law in the case. In just a few moments, you're
7 going to retire to the jury room, select one of your
8 members to act as foreperson, and begin performing the
9 function for which you have been chosen and for which
10 you have been empaneled in accordance with the oath that
11 you took as jurors.

12 Throughout this trial, I have admonished you
13 not to discuss the case with each other until it's
14 submitted to you. Well, now is the time for your -- to
15 begin your discussions. And you certainly may express
16 an opinion from the evidence that you have heard and use
17 any reasonable means to persuade other members of the
18 jury to your convictions and to your honest opinion.
19 You are to reach a verdict which speaks the truth and
20 which does justice to all parties without favor, bias,
21 or prejudice in any particular, either for or against
22 any party to this lawsuit.

23 Now, in the course of your deliberations, do
24 not hesitate to re-examine your own views and change
25 your opinion if convinced it is erroneous. But do not

1 surrender your honest conviction as to the weight or the
2 effect of the evidence solely for the -- because of the
3 opinion of your fellow jurors or for the mere purpose of
4 returning a verdict. The verdict must represent the
5 considered judgment of each juror. In order to return a
6 verdict, it is necessary that each juror agree thereto.
7 Your verdict must be unanimous.

8 As soon as you've reached the verdict, you
9 will let this fact be known to the officer who will be
10 waiting upon you, and he will report to the Court. One
11 of our Court Security Officers, I'm sure you have seen
12 them coming in, they will be at the door. You will let
13 them know.

14 Your verdict will be in the form of
15 questions for you to answer. You will take these
16 questions to the jury room. When you've reached a
17 unanimous agreement as to your verdict, you will have
18 your foreperson fill in, sign, and date the form and
19 then advise the security officer that you've reached a
20 verdict.

21 Now, during your deliberations, you may have
22 any of the exhibits which have been offered into
23 evidence and the Court will send them to you upon
24 written request. If you desire further instructions,
25 your foreperson may make this known in writing, and the

1 Court will try to comply with your wishes. All
2 communications with the Court must be in writing. But
3 at no time should you indicate to the Court or to anyone
4 else how the jury is divided in answering any particular
5 question.

6 Any notes that you have taken during this
7 trial are only aids to your memory. If your memory
8 should differ from the notes, then you should rely on
9 your memory and not the notes. The notes are not
10 evidence. A juror who has not taken notes should rely
11 on his or her independent recollection of the evidence
12 and should not be unduly influenced by the notes of
13 other jurors. Notes are not entitled to any greater
14 weight than the recollection or impression of each juror
15 concerning the testimony.

16 I'm going to now hand these to Mr. Rex Mann,
17 our -- my law clerk. Follow him to the jury room and
18 begin your deliberations in accordance with my
19 instructions.

20 LAW CLERK: All rise.

21 (Jury out.)

22 THE COURT: Please be seated.

23 Anything from the plaintiff at this time?

24 MR. PIERCE: No, Your Honor.

25 THE COURT: Anything from the defendant?

1 MR. MAYER: No, Your Honor.

2 THE COURT: Okay. Court's in recess pending
3 receipt of a verdict.

4 LAW CLERK: All rise.

5 (Recess.)

6 (Jury out.)

7 LAW CLERK: All rise.

8 THE COURT: Please be seated.

9 All right. Question No. 1 is -- Jury
10 Question No. 1, quote, on Question 1, if we answer no,
11 do we answer the other questions?

12 The Court's response: No.

13 Any objection from the plaintiff?

14 MR. PIERCE: No, Your Honor.

15 THE COURT: I assume none from the
16 defendant?

17 MR. WORTHINGTON: No, Your Honor.

18 THE COURT: All right. Hand this to them.
19 I couldn't read -- who was that -- I couldn't read the
20 name of the foreperson.

21 MS. ANDREWS: Clay -- is there a Clay?

22 THE COURT: Is there a Mr. Clay on there?

23 Sounds like we should anticipate something soon, so keep
24 your seat, you're fine.

25 (Recess.)

1 (Jury in.)

2 LAW CLERK: All rise.

3 THE COURT: Please be seated. Mr. Clay, I
4 understand you reached a verdict?

5 JURY FOREPERSON: Yes, sir.

6 THE COURT: All right. If you'd hand that
7 to -- Mr. Mann, if you'd go around and get that for me?
8 Thank you, sir.

9 All right. Ladies and gentlemen of the
10 jury, I'll just read the question number and your
11 answer. And I'd ask after I've done that, that you --
12 if this represents your verdict, so we'll have a record
13 here in open court, I'll ask you to stand if it
14 represents your verdict.

15 Question No. 1 is "No." In accordance with
16 the rest of the Court's instruction, no other questions
17 are answered. It's signed by Mr. Clay as the
18 foreperson.

19 If that represents your verdict, please
20 stand at this time. Thank you very much. For the
21 record, all jurors are standing.

22 Ladies and gentlemen, it's -- I can now
23 discharge you, and I need to give you a couple more
24 instructions. Number one instruction is you can talk to
25 anybody you want to now about anything that goes on in

1 this courtroom. It's up to you, but it's strictly up to
2 you whether you talk to anybody or not. It's your call
3 if you want to discuss it.

4 Now, I can tell you that the rules in the
5 Eastern District of Texas, at least since 1968, since
6 that's when I started in the Eastern District as a
7 lawyer, have been that the lawyers cannot talk to the
8 jurors or about their verdict unless the juror wants to
9 talk to the lawyer.

10 So if you want to say something to these
11 lawyers, let me assure you, they -- they want to hear
12 from you if you want to talk to them, but that's going
13 to be up to you. And if you're out there on the
14 sidewalk and you see one and you want to say something
15 to him, you'll have to initiate that conversation with
16 them, because they're under -- rules of this court have
17 been, like I said, for a number of years that they can't
18 contact you.

19 You have done your job well. I appreciate
20 your hard work, and I know that disputes are not easy to
21 resolve. But that's why we have the 7th Amendment that
22 the jurors want to resolve the factual disputes.

23 So I thank you very much for your service,
24 and at this time, I'm discharging you with that final
25 instruction. Come with the same great attitude if you

1 win my lottery again in the next few years, okay? Thank
2 you.

3 You may leave the courtroom at this time.

4 LAW CLERK: All rise.

5 (Jury out.)

6 THE COURT: Anything from the plaintiff at
7 this time?

8 MR. PIERCE: No, Your Honor.

9 THE COURT: Anything from the defendant?

10 MR. MAYER: No, Your Honor.

11 THE COURT: Okay. Gentlemen, I appreciate
12 your professional conduct, and I enjoyed the case with
13 you. Thank you.

14 LAW CLERK: All rise.

15 (Court adjourned.)

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATION

2

3 I HEREBY CERTIFY that the foregoing is a
4 true and correct transcript from the stenographic notes
5 of the proceedings in the above-entitled matter to the
6 best of my ability.

7

8

9

SHELLY HOLMES	Date
Deputy Official Reporter	
State of Texas No.: 7804	
Expiration Date: 12/31/10	

12

13

14

15

16

17

18

19

20

21

22

23

24

25